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PTO/SB/21 (09-04)

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09/915,030

Filing Date

07/25/2001

First Named Inventor

Robert Allan Musson

Art Unit

3621

Examiner Name

Backer, Firmin

Attorney Docket Number

1363-005

ENCLOSURES (Check all that apply)

<input checked="" type="checkbox"/> Fee Transmittal Form	<input type="checkbox"/> Drawing(s)	<input type="checkbox"/> After Allowance Communication to TC
<input checked="" type="checkbox"/> Fee Attached	<input type="checkbox"/> Licensing-related Papers	<input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences
<input type="checkbox"/> Amendment/Reply	<input type="checkbox"/> Petition	<input checked="" type="checkbox"/> Appeal Communication to TC (Appeal Notice, Brief, Reply Brief)
<input type="checkbox"/> After Final	<input type="checkbox"/> Petition to Convert to a Provisional Application	<input type="checkbox"/> Proprietary Information
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<input type="checkbox"/> Reply to Missing Parts/Incomplete Application	<input type="checkbox"/> Landscape Table on CD	
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SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name	King & Schickli, PLLC		
Signature			
Printed name	Michael T. Sanderson, Esq.		
Date	7-12-05	Reg. No.	43,082

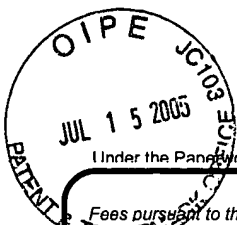
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PTO/SB/17 (12-04)

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**FEE TRANSMITTAL
For FY 2005**☐ Applicant claims small entity status. See 37 CFR 1.27**TOTAL AMOUNT OF PAYMENT (\$)** 500.00**Complete if Known**

Application Number	09/915,030
Filing Date	07/25/2001
First Named Inventor	Robert Allan Musson
Examiner Name	Backer, Firmin
Art Unit	3621
Attorney Docket No.	1363-005

METHOD OF PAYMENT (check all that apply)☐ Check ☐ Credit Card ☐ Money Order ☐ None ☐ Other (please identify): _____☒ Deposit Account Deposit Account Number: 11-0978 Deposit Account Name: King & Schickli, PLLC

For the above-identified deposit account, the Director is hereby authorized to: (check all that apply)

☒ Charge fee(s) indicated below ☐ Charge fee(s) indicated below, except for the filing fee☒ Charge any additional fee(s) or underpayments of fee(s) under 37 CFR 1.16 and 1.17 ☒ Credit any overpayments**WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.****FEE CALCULATION****1. BASIC FILING, SEARCH, AND EXAMINATION FEES**

Application Type	FILING FEES		SEARCH FEES		EXAMINATION FEES		Fees Paid (\$)
	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	
Utility	300	150	500	250	200	100	
Design	200	100	100	50	130	65	
Plant	200	100	300	150	160	80	
Reissue	300	150	500	250	600	300	
Provisional	200	100	0	0	0	0	

2. EXCESS CLAIM FEES

Fee Description	Fee (\$)	Small Entity Fee (\$)
Each claim over 20 or, for Reissues, each claim over 20 and more than in the original patent	50	25
Each independent claim over 3 or, for Reissues, each independent claim more than in the original patent	200	100
Multiple dependent claims	360	180

Total Claims	Extra Claims	Fee (\$)	Fee Paid (\$)	Multiple Dependent Claims	Fee (\$)	Fee Paid (\$)
_____ - 20 or HP = _____ x _____ = _____						
HP = highest number of total claims paid for, if greater than 20						
Indep. Claims	Extra Claims	Fee (\$)	Fee Paid (\$)			
_____ - 3 or HP = _____ x _____ = _____						
HP = highest number of independent claims paid for, if greater than 3						

3. APPLICATION SIZE FEE

If the specification and drawings exceed 100 sheets of paper, the application size fee due is \$250 (\$125 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s).

Total Sheets	Extra Sheets	Number of each additional 50 or fraction thereof	Fee (\$)	Fee Paid (\$)
_____ - 100 = _____	_____ / 50 = _____	(round up to a whole number) x _____	= _____	

4. OTHER FEE(S)

Non-English Specification, \$130 fee (no small entity discount)

Other: Appeal Brief filing fee 37CFR § 41.20 (b)(2)

Fees Paid (\$)

500.00

SUBMITTED BY

Signature		Registration No. (Attorney/Agent)	43,082	Telephone	(859) 252-0889
Name (Print/Type)	Michael T. Sanderson, Esq.	Date	7-12-05		

This collection of information is required by 37 CFR 1.136. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 30 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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Docket No. 1363-005

In re application of

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Group Art Unit: 3621

Examiner: Backer, Firmin

APPEAL BRIEF

Alexandria, VA 22313-1450

Responsive to the Office Action of May 9, 2005, the Applicant hereby appeals the final rejection of claims 1-21. A Notice of Appeal was timely filed on May 31, 2005 and received by the Patent Office on June 2, 2005. Also, this brief is filed with a fee transmittal indicating payment of the appropriate \$500.00 fee set forth in 37 C.F.R. §41.20(b)(2).

Page 1 of 32

I. Real Party in Interest

The real party in interest is Novell, Inc., a corporation of the State of Delaware, having a principal place of business at 1800 South Novell Place, Provo, Utah 84606. As of today, a Petition to Proceed with Non-Signing Inventor¹ Under 37 C.F.R. §1.47(b) remains pending. It should be noted, however, this petition was filed concurrent with the filing of the patent application on July 25, 2001 and the Patent Office has still offered no position. It is now nearly four full years later.

II. Related Appeals and Interferences

The Appellant knows of no other appeals or interferences, or judicial proceedings, which may be related to, directly affect, or be directly affected by, or have a bearing on, the Board's decision in this Appeal.

III. Status of Claims

All pending claims (1-21) stand finally rejected under 35 U.S.C. §103(a) as obvious in view of the combination of Beery U.S. Publication No. 2001/0034846 A1 and Kenton et al. U.S. Patent No. 5,479,612. Previously, claims 1-21 stood rejected as anticipated by Beery. The Appellant presented an Amendment on February 3, 2005 and, apparently, overcame the Beery anticipation rejection. In the Final Office Action, the Examiner combines Beery with Kenton as a new ground(s) of rejection, deems the new ground(s) necessitated by the previous amendment and issues a Final Rejection.

¹ The inventor's name is Robert Alan Musson.

To this end, the Appellant appeals the rejection of all pending claims 1-21. Claims 1, 8, 18 and 21 are independent.

IV. Status of Amendments

No amendment has been filed subsequent to the Final Office Action dated May 9, 2005 and all previous amendments have been entered. The form of the claims for purposes of appeal are those presented in the Amendment filed by the Appellant on February 3, 2005 (received by the Patent Office on February 7, 2005). As required, a copy of the claims is also included herewith in Appendix form.

V. Summary of Claimed Subject Matter

Claims 1-21 are pending. Claims 1, 8, 18 and 21 are independent.

The present invention relates broadly to methods, systems and data for ensuring proper licensing of computer software, for example, at a single computing device in a larger computing system environment or as a stand alone device. In one aspect, a “data file” has portions thereof “removed” (e.g., step 40, Figure 1) to prevent use of the data file. If later licensing is proper/validated (e.g., step 100, Figure 1), the removed portions are then “restored” (e.g., step 110, Figure 1) to allow complete use of the data file. On the other hand, if licensing is improper/invalid, the step of restoration never occurs and the data file remains unusable (e.g., step 120, Figure 1). In another aspect, the instant invention concerns itself with wrapping sets of executable instructions (e.g., 310, Figure 3) and data files (e.g., 330, Figure 3) that all reside coincident with a single computing device (e.g., 290, Figure 3) desirous of using the data file. As a result, the wrapping set of executable instructions are able to locally remove and/or restore chunks (portions) of the data file before and/or after

execution of the licensing set of executable instructions. In this manner, the computing device itself “need not acquire permission from a network license server to use a piece of software (e.g., data file).” *Applicant's Specification, Page 9, Lines 8-9.*

A data file of the invention embodies, for example, an “executable” file (*Applicant's Specification, p. 7, l. 13*); a “file which is used by an executable program such as music data received in MP3 format as depicted in step 10” (*Applicant's Specification, p. 10, l. 9-11*); “software application programs” (*Applicant's Specification, p. 7, l. 13*); “a piece of audio such as a piece of music, or video such as a movie” (*Applicant's Specification, p. 7, l. 14-15*); “images associated with art, photographs, or drawings” (*Applicant's Specification, p. 7, l. 17*); “any electronic data which the data provider wishes to control and license its distributions and use with an electronic media” (*Applicant's Specification, p. 7, l. 18-19*). Also, the data file may be “contiguous data or [] separate units of data which when assembled create a single unit of contiguous data.” *Applicant's Specification, p. 7, l. 22-23.*

In independent claim 1, and consistent with Figures 1 and 3, for example, the below-quoted limitations of the claim are found as follows: a data file (330, Figure 3) is received (step 20, Figure 1) by a computing device (290, Figure 3). A portion of the data file is then removed (step 40, Figure 1) at the computing device and use of the data file is prevented. In turn, a license set of executable instructions is “wrapped ... around the data file” (step 60, Figure 1) and the executable instructions are “executed” at the same computing device to determine whether a valid license of the data file exists (step 80, Figure 1). If a valid license exists, then the previously removed portions of the data file are, at the computing device, “restor[ed] . . . thereby making the data file available for use” (step 110, Figure 1).

In dependent claim 3, and appreciating that the originator or owner of the data file will sometimes not co-exist with the computing device performing the removing and restoring of portions of the data file, the owner, at a location other than the computing device location, is notified if a valid license does not exist (e.g., step 130, Figure 1).

In independent claim 8, it is required to “receive” a license set of executable instructions at a time when a computing device “is in communication with one or more licensing computing devices.” As seen in Figure 4, for example, a computing device 370 is in communication with devices 350 and 360. Execution of the license set of executable instructions then occurs “exclusively at the computing device” independent of the step of receiving to determine if the license set of executable instructions is associated with a valid license. As described in *Applicant’s Specification*, p. 15, l. 9 et seq.:

Validation and execution need not occur while the computing device 370 is in communication with any other external computing devices such as devices 350 and 360, since once the data file/program 390 is acquired from one or more of the external devices 350 or 360 the computing device is free to use the data file/program 390 and with each such use validation ensures that a proper authority exists to use the data file/program 390.

As further claim elements, the steps of “permitting” and “preventing” the executable instructions from further executing on the computing device (e.g., 370, Figure 4) then occurs if a valid license exists or does not exist, respectively. This is seen diagrammatically as 380, 390, 400, 410, and 430 in Figure 4, for example, within the boundary of the computing device 370.

In dependent claim 9, the step of executing especially occurs at a time when the computing device is no longer in communication with the one or more licensing computing devices. Support for this is found, for example, at p. 15, l. 9 et seq. *quoted supra*.

In dependent claims 11 and 12, “removing” portions of the license set of executable instructions and “restoring” the removed portions occurs “exclusively at the computing device.” The steps of removing and restoring are again seen in Figure 1, for example, at

steps 40 and 110. In Figures 3 and 4, they are seen diagrammatically within the boundaries of the computing device 290 and 370, respectively.

Similar to claim 3 above, and appreciating that the originator or licensor of the executable instructions will sometimes not co-exist with the computing device, the licensor in dependent claim 16, at other than the computing device location, is notified electronically if execution of the executable instructions is attempted at the computing device without a valid license. Notifying occurs in the Applicant's specification, for example, at step 130, Figure 1, step 270, Figure 2 or step 420, Figure 4.

In claim 17, which depends from 16, the step of notifying occurs as soon the computing device is capable of being in communication with the licensing computing devices, such as at a time in Figure 4 when the computing device 370 is in communication with devices 350 or 360.

In independent claim 18, a wrapping set of executable instructions are operable to "remove" a portion of a data file to prevent the use of the data file. A validation set of executable instructions exist "on the computing device" and are called by the wrapping set of executable instructions to "permit the data file to be useable on the computing device if a valid license to use the data file exists on the computing device." In turn, the "usability" of the data file includes "restoration of the removed portion of the data file." As seen in the many Figures, a wrapper 310 (Figure 3) or 380 (Figure 4) is executed step 80 (Figure 1) or 190 (Figure 2). Removal and restoration of data files to prevent/permit use of data files occurs as steps 40, 110 (Figure 1), 240 (Figure 2) in conjunction with validating licenses step 100 (Figure 1), 200 (Figure 2), 320 (Figure 3) or 400 (Figure 4).

In dependent claim 20, the validation set of executable instructions "operates while the computing device is not in communication with any external computing devices." *See, e.g., Applicant's Specification, p. 15, l. 9 et seq.*

In independent claim 21, wrapping instruction data is “exclusively operable at a stand alone computing device to assemble electronic data including removal of a portion of the electronic data.” *See, e.g., Applicant’s Specification, p. 15, l. 9 et seq.* Validating instruction data is likewise “operable at the computing device” to determine whether valid licenses exist. If so, then “providing the assembled electronic data for use including restoration of the removed portion of the electronic data.” Removal and restoration at a stand alone computing device is again supported throughout the Applicant’s Specification. *See, e.g.,* the many Figures: a wrapper 310 (Figure 3) or 380 (Figure 4) is executed step 80 (Figure 1) or 190 (Figure 2); removal and restoration of data files to prevent/permit use of data files occurs as steps 40, 110 (Figure 1), 240 (Figure 2) in conjunction with validating licenses step 100 (Figure 1), 200 (Figure 2), 320 (Figure 3) or 400 (Figure 4); and within the boundaries of a stand alone computing device 290 (Figure 3) or 370 (Figure 4), wrapper programs and data files co-exist at a single computing device.

VI. Grounds of Rejection to be Reviewed on Appeal

The Board must determine whether claims 1-21 are rendered obvious under 35 U.S.C. §103(a) in view of the combination of references to Beery U.S. Publication No. 2001/0034846 A1 and Kenton et al. U.S. Patent No. 5,479,612.

More particularly, the Board must (A) determine whether the Beery and Kenton references are properly combinable or whether they teach away; (B) determine whether the Examiner met his prima facie burden; and (C) even if the references are somehow combinable, determine whether the references together supply the necessary teachings rendering the claims obvious.

VII. Argument

A. Beery U.S. Publication No. 2001/0034846 A1 and Kenton et al. U.S. Patent No. 5,479,612 teach away from one another and are improperly combined.

As the law provides, “[a] prima facie case of obviousness can be rebutted if the applicant . . . can show ‘that the art in any material respect taught away’ from the claimed invention.” *In re Haruna*, 249 F.3d 1327, 1335, 58 USPQ2d 1517, 1522 (Fed. Cir. 2001)(quoting *In re Geisler*, 116 F.3d 1465, 1469, 43 USPQ2d 1362, 1365 (Fed. Cir. 1997)).

1. Beery Teaches Exclusive Remote Licensing Control While Kenton Teaches Exclusive Local Control

In contrast to the instant invention, Beery teaches user authentication, wrapper programs and data-chunk removal of software occurring exclusively at a software distributor’s server/database 40, 42 and/or 60 remote (especially via a network communication link 50, Figure 2) from the computing device 44 and/or 68 attempting to utilize the software. In this manner, Beery remotely controls whether or not each individual computing device is authorized to use the software. If authorized, the remote server then transmits the removed data chunks and associated wrapper programs (e.g., Figure 4) over a network connection to the computing device desirous of utilizing the software.

To this end, the Examiner agrees. According to the Final Office Action, the Examiner states “Berry [sic] fails to teach an inventive concept of an executable instruction exclusively at a computing device.” *Underlining added, 5-9-2005 Final Office Action, p. 3, ll. 5-6; p. 4, ll. 13-14; and p. 6, ll. 6-7.*

On the other hand, Kenton has nothing at all to do with the instant invention. While it arguably teaches executable instructions at a computing device 102, it does so in a context of locally determining whether an appropriate handshake exists between an operating system 106 of a computer 102 and an attendant peripheral device 110, such as a printer. If the handshake is proper, licensing is locally deemed proper and the peripheral device then works with the computer.

The Examiner's sole characterization of Kenton consists of "Kenton et al teach[es] an inventive concept of an executable instruction exclusively at a computing device (*see abstract column 2 lines 21-41*)."² *Italics in original, underlining added, 5-9-2005 Final Office Action, p. 3, ll. 6-7; p. 4, ll. 4-16; and p. 6, ll. 7-8.* Together, he contends the claims are rendered obvious.

Even assuming the Examiner's characterization of Kenton is correct, Beery antithetically teaches exclusive remote control of licensing, not exclusive local control. Thus, the references diverge from one another in the most of material ways and are improperly combined.

As the law further provides, "[t]here is no suggestion to combine . . . if a reference teaches away from its combination with another source" *Tec Air, Inc. v. Denso Mfg. Mich. Inc.*, 192 F.3d 1353, 52 USPQ2d 1294, 1298 (Fed. Cir. 1999). The court has also noted, "as a 'useful general rule,' that references that teach away cannot serve to create a prima facie case of obviousness." *McGinley v. Franklin Sports, Inc.*, 262 F.3d 1339, 60 USPQ2d 1001, 1010 (Fed. Cir. 2001)(quoting *In re Gurley*, 27 F.3d 551, 553, 31 USPQ2d 1130 (Fed. Cir. 1994)).

² As described below in Argument §B(3), the Appellant understands this rejection to mean Kenton et al. teaches licensing of peripheral devices via exclusive control of a computing device and the computing device includes executable instructions.

2. The Combination of Beery and Kenton Result in an Inoperable Device

To the extent the Examiner's characterization of Kenton is correct, if Beery exclusively teaches remote control of licensing authorization at a software distributor's server/database 40, 42 and/or 60 remote (especially via a network communication link 50, Figure 2) from the computing device 44 and/or 68 attempting to utilize the software and Kenton teaches "an inventive concept of an executable instruction exclusively at a computing device" (*underlining added, 5-9-2005 Final Office Action, p. 3, ll. 6-7; p. 4, ll. '4-16; and p. 6, ll. 7-8*), how do skilled artisans decide between one reference offering exclusive remote control of licensing (Beery) and one reference offering exclusive local control of licensing (Kenton) if they decide at all to combine the references? Nonetheless, if skilled artisans decide to combine the references, a seemingly inoperable device results. Stated differently, skilled artisans cannot obtain an operable device simultaneously having exclusive remote control of licensing and exclusive local control of licensing. The two are mutually exclusive.

As to inoperable devices, the law states "[i]f a reference taken in combination would produce a 'seemingly inoperative device,' we have held that such references teach away from the combination and thus cannot serve as predicates for a prima facie case of obviousness." *McGinley* 60 USPQ2d at 1010 (quoting *In re Spinnoble*, 405 F.2d 578, 587, 160 USPQ 237, 244 (C.C.P.A. 1969)).

3. Neither Beery (Remote Licensing Control) nor Kenton (Local Licensing Control) Support the Proposition of the Other

Beery never recognizes that the wrapper programs, user authentication or data-chunk removal of its teaching could ever reside/occur at a local computing device, as opposed to

their preferred distributor's remote server. For if they could, they would promote multiple usages of software with only a single authorization.³ To the contrary, Beery desires to control the missing data-chunk of software at the remote server so that all local devices communicate with the remote server when they desire to use the software. Beery strongly asserts this when reciting: “[t]he [removed] non-contiguous data chunk is never stored with the software package including the temporary installation directory.” *Underlining added, Beery*, ¶ [0022], ll. 20-22. Rather, the “location of the removed chunk is stored on the distributor’s database as an instance for each distribution along with the associated serial number” *Beery*, ¶ [0022], ll. 24-27. In other words, Beery insists on removal and restoration of data chunks at a location remote from a computer that uses the data chunks and does so with every instance of usage.

Kenton, on the other hand, provides that:

there are two methods that can be used by a computer system to provide software connectivity and support for a peripheral device: (1) an external peripheral software driver (a.k.a. external software driver); and (2) an internal peripheral software driver (a.k.a. internal software driver) that is contained within the operating system. *Col. 1, ll. 17-23.*

As such, Kenton expressly recognizes both (1) remote and (2) local control of peripheral drivers and exclusively offers local control solutions to the problems associated with peripheral device licensing. Namely, an operating system 106 of a computer 102 having an attendant peripheral device 110 exclusively locally controls the authentication of its peripheral devices 110A-110N. Moreover, Kenton absolutely insists on local control, never

³ Beery disparages single authorizations when describing U.S. 6,978,918 (Scholnick): “[i]n summary, [the Scholnick] method and system of authentication only secures data against unauthorized use by 3rd parties and does not protect against unlicensed use by primary party [sic] who are using the data in an illegal manner.” *Beery*, ¶ [0010], *final sentence*.

remote, because Kenton's preliminary first step in solving the problem of peripheral device licensing is to assess whether the operating system 106 of the computer 102 can, in fact, even support or has compatibility with a peripheral device 110 under consideration. In the event support/compatibility of the operating system does not exist, error messages are displayed and access is ultimately precluded. *See, e.g., steps 204, 206 Figure 2 and col. 4, ll. 30-40 (citing: "In decisional step 204, the operating system 106 examines the device identification information returned from step 202 and compares this to data to a list (not shown, but located within the operating system 106) of peripheral devices supported by the operating system 106. If peripheral device 110 is not included in the aforementioned internal list, then the peripheral device 110 is not compatible with the operating system 106. In this situation, the operating system displays an error message and access of the peripheral device 110 is precluded by the operating system 106, as shown in step 206.")*.

Also, Kenton expressly teaches nuances of the peripheral device license as driver license key 302, including an "optional license key expiration date field 314." *Col. 4, ll. 55-56*. To this end, if a peripheral device requires a license (step 208, Figure 2), a check is made to see whether "keys" are "installed in the keys file" (step 212, Figure 2). For the expiration date field 314, "[a]fter this date [in field 314], the driver license key 302 will be ignored (considered invalid) by the operating system 106." *Col. 5, ll. 2-4*.

In contrast, Beery recognizes both keys (e.g., U.S. 6,061,448 (Smith) "provides a method and system for secure document delivery over a wide area network utilizing a secret key to encrypt documents which are then encrypted using a public key." *Beery*, ¶ [0011], *first sentence*) and time stamps (e.g., "[t]he Scholnick patent replaces the notion of an encryption system with a method for replacing secure data with a time sensitive token which is encrypted." *Beery*, ¶ [0010], *first sentence*) and unequivocally disparages both.⁴

⁴ "Smith, as Scholnick before him, only protects for the interception of software by unauthorized parties, however the patent does not protect software applications from unlicensed use by primary parties, for example, where

Thus, skilled artisans would not be led to combine Beery and Kenton and arrive at the instant invention. Beery leads down one road, Kenton leads down an opposite road and the instant invention leads down still another road. *See, e.g., Tec Air, Inc.* 52 USPQ2d at 1298 (“A reference may be said to teach away when a person of ordinary skill, upon reading the reference, . . . would be led in a direction divergent from the path that was taken by the applicant.” (Quoting *In re Gurley*, 27 F.3d at 553, 31 USPQ2d at 1131)).

4. The Instant Invention Recognizes and Disparages/Teaches Away from Beery

The instant Novell invention recognizes systems requiring remote licensing control, such as Beery, and expressly discourages solving licensing problems in this fashion. Namely,

attempts have been made to require users to be connected to an external license server before use of the electronic data may proceed in a normal fashion. In this way, a user using an existing connection to the Internet, or using a direct connection to the license server, authenticates the use of the electronic data before each use of the data. In this instance, the data itself includes disabling logic or instructions which are not enabled until the data is properly authenticated by the license server. However, as is obvious by the above description, the data cannot be used [by a computing device] unless a connection is made and maintained with the [remote] license server to authenticate the data. *Applicant's Specification, Page 2, lines 6-14.*

Thus, the instant invention concerns itself with wrapping sets of executable instructions and data files that all reside coincident with the computing device desirous of

a user's license has exceeded the licensed time limit or the user is using the software on multiple computing devices.” *Beery*, ¶ [0012], *final sentence*.

using the data file. As a result, the wrapping set of executable instructions are able to locally remove and/or restore chunks (portions) of the data file before and/or after execution of the licensing set of executable instructions. In this manner, the computing device “need not acquire permission from a network license server to use a piece of software (e.g., data file).” *Applicant’s Specification, Page 9, Lines 8-9.*

In support, both the Applicant’s Figures 3 and 4 show the wrapper 310, 380 and the validating set of executable instructions 320, 400, operable to determine whether a valid license is present, locally on the computing device 290, 370 desirous of using the data file. The specification even recites advantage of this as including operability “even when the computing device 290 is in a stand alone mode of operation and not in communication with any external computing devices” (*Applicant’s Specification, Page 14, lines 13-15*); and:

[v]alidation and execution need not occur while the computing device 370 is in communication with any other external computing devices such as devices 350 and 360, since once the data file/program 390 is acquired from one or more of the external devices 350 or 360 the computing device is free to use the data file/program 390 and with each such use validation ensures that a proper authority exists to use the data file/program 390.” *Applicant’s Specification, Page 15, lines 9-14.*

B. The Examiner Fails to Meet his Burden of Establishing Obviousness

As longstanding precedent, the initial burden of establishing a prima facie basis to deny patentability to a claimed invention on any ground is always on the examiner. *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). However, it appears the Examiner’s legal position in the instant matter relates exclusively to Beery teaching/disclosing the entirety of all the pending claim elements with the exception that

Kenton provides the teaching “of an inventive concept of an executable instruction exclusively at a computing device (*see abstract column 2 lines 21-41*).” *Italics in original, 5-9-2005 Final Office Action, p. 3, ll. 6-7; p. 4, ll. 4-16; and p. 6, ll. 7-8.* For several reasons, the Appellant submits this rationale is flawed and insufficient as a matter of law.

1. Beery and Kenton Teach Away

The preceding arguments have shown that Beery and Kenton are diametrically opposed in their teachings (e.g., exclusive remote vs. exclusive local control of licensing) and that neither, ever supports the proposition of the other. For this reason alone, obviousness cannot be established and the Examiner’s rejection fails. *See, e.g., Winner International Royalty Corp. v. Wang*, 202 F.3d 1340, 53 USPQ2d 1580, 1587 (Fed. Cir. 2000)(If a first reference “did in fact teach away from [a second reference], then that finding alone can defeat [an] obviousness claim” based on a combination of the two references.).

2. Kenton Adds Nothing to the Discussion of Patentability of the Pending claims.

Kenton relates not at all to the instant invention. In one aspect, Kenton teaches an operating system having a driver for an attendant peripheral device. In another aspect, the operating system handshakes with the peripheral device to ascertain whether licensing is required and/or proper. To this end, the Appellant questions Kenton’s relevance. The Appellant has long appreciated that operating systems include drivers for peripheral devices and that operating systems communicate with peripheral devices for a variety of reasons. However, this adds nothing to the discussion of patentability of the pending claims. Also, Kenton nowhere relates one iota to the removal and restoration of portions of data files at a

computing device attempting to use the data files, as variously recited by claims 1-7, 11-15 and 18-21; wrapping sets of executable instructions, as expressly required by claims 1-7 and 18-21; notifying owners/licensors of data files of invalid licenses remote from a local computing device attempting to use the data files, as expressly required by claims 3, 16 and 17; and receiving a license set of executable instructions at a time when a computing device is communicating with one or more other licensing computing devices and then executing the license set of executable instructions exclusively at a computing device independent of the step of receiving, as expressly required by claims 8-16. In turn, because Beery unequivocally also does not teach these precise aspects of the invention,⁵ Beery and Kenton cannot render the claims obvious.

3. Kenton never uses the words upon which the Examiner relies to make the obviousness rejection.

The Examiner solely reasons Kenton provides a necessary teaching of “executable instructions exclusively at a computing device.” However, Kenton never uses the word exclusively. Kenton also provides no instances of usage of the words executable or executable instructions. The Examiner does, however, provide cites to Kenton. Namely, “see abstract column 2, lines 21-41.” *5-9-2005 Final Office Action*, p. 3, l. 7; p. 4, ll. 15-16; and p. 6, l. 8. In their entirety, these cites include:

System and method of encouraging computer system customers
to purchase licenses before employing certain types of

⁵ See, also, the Examiner’s admission that “Berry [sic] fails to teach an inventive concept of an executable instructions exclusively at a computing device.” *5-9-2005 Final Office Action*, p. 3, ll. 5-6; p. 4, ll. 13-14; and p. 6, ll. 6-7.

peripheral devices for use with their computer system. The computer system establishes contact with a peripheral device. It then verifies that the peripheral device is supported by the operating system. If the peripheral device is supported, the system determines whether the peripheral device is licensed (and therefore requires a driver license key in order for the peripheral device to be accessed by the system). If the peripheral device requires a driver license, the system determines whether the corresponding driver license key is installed in the keys file of the computer system. If the driver license key is not installed, the system compels (or encourages) installation of the driver license key by (1) displaying a licensing violation message instructing the customer to obtain the proper license; and/or (2) precluding access of the peripheral device by the computer system. *Abstract.*

In one embodiment of the present invention, the system operates as follows: The computer system establishes contact with the peripheral device. It then verifies that the peripheral device is supported by the operating system. If the peripheral device is supported, the system determines whether the peripheral device is licensed (and therefore requires a software driver license key in order for it to be accessed by the system). If the peripheral device requires a software driver license, the system determines whether the corresponding driver license key is installed in the keys file of the computer system. If the driver license key is not installed, the system compels (encourages) installation of the driver license key by (1) displaying a licensing violation message instructing the customer to obtain the proper license; and/or (2) precluding access of the peripheral device by the computer system. Accordingly, the present invention improves the ability of computer system developers to recoup their research and development costs associated with developing embedded software drivers and therefore avoids the problems described above. *Col. 2, ll. 21-41.*

The Appellant, then, is unaware of how the Examiner draws the conclusion as to

“executable instruction exclusively at a computing device.” To the extent the Examiner’s rejection foundation includes their own personal knowledge, 37 C.F.R. §1.104(d)(2) requires the Examiner provide an affidavit, upon request of the Applicant, that sets forth their rationale. **Thus, an affidavit or an indication in the Examiner’s brief is hereby requested.**

In the alternative, to the extent computing devices include executable instructions, the Appellant does not dispute this and does not dispute that the Kenton reference teaches exclusive local control of peripheral device licensing. However, “executable instructions exclusively at a computing device,” is somewhat odd nomenclature and the Appellant is somewhat unclear as to the preciseness of the Examiner’s position.

4. The Examiner’s Characterization of Kenton, in combination with Beery, Over-Simplifies the Relationship of the Claim Terms.

The Appellant does not dispute that Kenton teaches exclusive local control (e.g., operating system 106 of computer 102) of peripheral device licensing. The Appellant does not dispute that Kenton’s local computer contains “executable instructions,” despite the lack of usage of the words in the Kenton specification. However, to suggest that because Kenton teaches “an executable instruction exclusively at a computing device” (*5-9-2005 Final Office Action*, p. 3, ll. 6-7; p. 4, ll. 4-16; and p. 6, ll. 7-8) it somehow, in combination with Beery, renders the claims obvious, is to over-generalize or over simplify the relationship of the claim terms.

As seen in the claim Appendix, for example, claim 1 precisely requires receipt of a data file at a computing device and then removal and restoration (if a valid license) of a portion of the data file at the same computing device. It further includes wrapping a particular license authentication set of executable instructions around the data file at the same

computing device and then executing the license authentication set of executable instructions at the computing device to determine whether the data file itself is even associated with a valid license. In other words, claim 1 requires a precise interaction of operations relative to a data file at particular locations. It also requires them in a context related to timing.

Thus, the Appellant submits that rejecting these precise claims as obvious in view of Kenton's broad teaching, that exclusive local control of peripheral device licensing occurs, is akin to arguing that a broad genus anticipates or renders obvious a definitively more narrow species.

In contrast, the law has long provided, a "prior art reference that discloses a genus still does not inherently disclose all species within that broad category." *Metabolite Laboratories, Inc. V. Laboratory Corp. of America Holdings*, 370 F.3d 1354, 71 USPQ2d 1081, 1091 (Fed. Cir. 2004)(The court also quoted from *Corning Glass Works v. Sumitomo Elec. USA, Inc.*, 868 F.2d 1251, 1262, 9 USPQ2d 1962 (Fed. Cir. 1989)("Under [defendant's] theory, a claim to a genus would inherently disclose all species. We find [this] argument wholly meritless [sic] ...")(Bold Added)).

5. No Motivation Exists to Combine Beery with Kenton and Hindsight Reasoning of Motivation is Improper

As outlined in *Ruiz v. A.B. Chance Co.*, 357 F.3d 1270, 1275 69 USPQ2d 1686, 1690 (Fed. Cir. 2004), "virtually all [inventions] are combinations of old elements."⁶ Also, an obvious determination under 35 U.S.C. 103(a) requires an "as a whole" analysis of the prior art to otherwise prevent an impermissible "evaluation of the invention part by part." *Id.* For otherwise, "an obviousness assessment might break an invention into its component parts

⁶ Citing *Envtl. Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 698, 218 USPQ 865 (Fed. Cir. 1983).

(A+B+C), then find a prior art reference containing A, another containing B, and another containing C, and on that basis alone declare the invention obvious.” *Id.* In turn, “this form of hindsight reasoning, using the invention as a roadmap to find its prior components, would discount the value of combining various existing features or principles in a new way to achieve a new result - often the very definition of invention.” *Id.* The court also reaffirmed this “as a whole” rationale as recently as June 9, 2005 in *Princeton Biochemicals, Inc. v. Beckman Coulter, Inc.*, Fed. Cir. No. 04-1493, 6/9/2005. Namely,

this ‘as a whole’ assessment of the invention requires a showing that an artisan of ordinary skill in the art at the time of invention, confronted by the same problems as the inventor and with no knowledge of the claimed invention, would have selected the various elements from the prior art and combined them in the claimed manner. *Id.* 04-1493 at 9.

First, it has been nearly four full years since the time of filing.

Second, the Examiner asserts the motivation or suggestion to combine Beery and Kenton relates to the nature of the problem to be solved. Namely, motivation to combine relates to “enhanc[ing] the security of the system by providing a system and method of encouraging computer system customers to purchase licenses before employing certain types of peripheral devices for use with their computer system.” 5-9-2005 *Final Office Action*, p. 3, ll. 10-13; p. 4, final three lines; and p. 6, ll. 11-14.

Third, the Appellant agrees the law allows for examining the nature of the problem to be solved when determining motivation.⁷ However, the instant invention does not address solving the problem of “employing certain types of peripheral devices for use with their

⁷ “A suggestion or motivation to modify prior art teachings may appear in the context of the public prior art, in the nature of the problem addressed by the invention, or even in the knowledge of one of ordinary skill in the art.” Underlining added, *Princeton Biochemicals*, 04-1493, 6/9/2005.

computer system” as the Examiner contends. Rather, the instant invention relates broadly to “methods and systems for validating and customizing licenses associated with the distribution and use of electronic data.” *Applicant’s specification, p. 1, ll. 3-4*. More narrowly, the instant invention relates to removal and restoration of portions of data files at a computing device desirous of using the data files, including wrapping and executing a license authentication set of executable instructions at the computing device.⁸ However, at no time does the instant invention relate to peripheral devices or purchasing licenses before their employment. While the instant invention does indeed offer enhanced security in the context of licensing, it is overstated to characterize the nature of the problem to be solved as simply the examination of enhancing licensing security because the claims are themselves much more narrow in focus.⁹

Fourth, the Court of Appeals for the Federal Circuit has warned that, “*simply identifying all of the elements in a claim in the prior art does not render a claim obvious.*”¹⁰ *Emphasis added, Princeton Biochemicals*, 04-1493, 6/9/2005. Some quantum of proof is certainly required. *Id.* To the extent the Examiner has identified all the elements of any one claim, although the Appellant strongly asserts this has not occurred, the Examiner has so far only offered proof of motivation to combine Beery and Kenton by contending (without substantiation) that “it would have been obvious to one of ordinary skill in the art

⁸ The selected language here comes from claim 1. Of course, the other claims have similar, but varied limitations and the variations of any given claim control its scope.

⁹ In *Princeton Biochemicals*, by analogy, the cited nature of the problem to be solved was substantively narrow and was that of “lengthening and securing the capillaries on the Honda automatic device to produce better separation [of proteins and other matter].” However, the preamble of the claim under consideration broadly recited “capillary electrophoresis apparatus.” Relative to the instant invention, the preamble of claim 1, for example, requires “a method of ensuring proper licensing.” Thus, the nature of the problem to be solved, when determining motivation, should be definitively more narrow than simply examining licensing and its security. It should properly extend to the more narrow limitations of the claim.

¹⁰ Citing *Ruiz*, 357 F.3d at 1275.

at the time the invention was made to modify the inventive concept of Berry [sic] to include Kenton at al . . . [for] encouraging computer system customers to purchase licenses before employing certain types of peripheral devices for use with their computer system.” 5-9-2005 *Final Office Action*, p. 3, ll. 8-13. However, this assertion is rawly given and merely represents what the Examiner thinks a skilled artisan would have thought about the instant invention four years ago, to the extent peripheral devices and securing licenses of peripheral devices before their employment are at all even relevant to the instant invention. It is also a scant assertion with little, if any, underlying support. As Judge Rader of the Federal Circuit reiterated¹¹ in *Princeton Biochemicals*, 04-1493 at 11, “this court express[es] skepticism about invoking the knowledge of a skilled artisan to supply the motivation to combine on a scanty record.” Also, it is respectfully submitted that just because the Examiner baldly makes an assertion, it does not mean the assertion is true or that it is even relevant.

C. The Pending Claims Distinguish Over the Beery and Kenton Combination

To the extent the combination of Beery and Kenton can even be sustained, the Appellant presents the following reasons of patentability. Broadly stated, the independent claims 1, 8, 18, and 21 include various limitations relating to the notion of local (i) wrapper sets of executable instructions, (ii) data files, (iii) removal of portions of data files and (iv) authenticating licenses directly on the computing device desirous of utilizing the data file.

With more specificity of claim patentability, **claim 1** requires the steps of receiving data files, removing portions of the data file, wrapping a license authentication set of executable instructions around the data file, executing the license authentication set of instructions, and restoring the removed portions of the data file all “at the computing device”

¹¹ Citing to *In re Lee*, 277 F.3d 1338, 1343-44 (Fed. Cir. 2002).

location. Beery, on the other hand, teaches exclusively remote processing. Kenton teaches local control of handshaking, with keys, between an operating system and an attendant peripheral device to determine if and when licensing of the peripheral device is proper.

In claim 3, the notion of remote versus local processing is further distinguished by requiring “notifying an owner” at a location “other than the computing device location” that a data file does not have a valid license. This further clarifies that the owner is remote from the local computing device where authenticating, data file removal and other processing occurs. Beery has no instances of usage where local exclusive licensing control occurs. Kenton, on the other hand, exclusively notifies local users (e.g., step 206, Figure 2 “display error message”) of failed peripheral device licensing. Also, Kenton is silent to remote owners of licenses being notified. **Claims 16 and 17** have similar limitations and it is submitted that patentability exists for the reasons related to claim 3.

In claim 8, the step of executing the license set of executable instructions occurs “exclusively at the computing device” and such is not taught by Beery. The claim further requires “permitting the license set of executable instructions to further *execute on the computing device*,” not some remote licensing server. Again, Beery does not teach this type of processing and, in fact, teaches away from it. Relative to Kenton, the claim further requires “receiving a license set of executable instructions” at a time when “a computing device housing . . . is in communication with one or more licensing computing devices.” Kenton has absolutely no instances of usage relating to a network environment. Kenton wholly contemplates a local computer and an attendant local peripheral device. Further, the claim requires if-then steps of “permitting” and “preventing” further execution of the executable instructions, depending upon whether or not a valid license exists according to the step of executing (which occurred exclusively at the computing device in receipt of the executable instructions in communication with one or more other licensing computing devices). It is submitted that neither Beery nor Kenton contemplate such a complex scenario.

In claim 9, it is even further required that the step of executing occurs at a time when “the computing device is not in communication with one or more of the [other] licensing computing systems.” In other words, this claim relates to making and breaking network connections and, after a network connection is broken, execution “exclusively” at the local computing device takes place “to determine if the license set of executable instructions is associated with a valid license.” To the contrary, Beery requires the remote licensing server to always perform license authentication and unequivocally insists that authentication never occur on the local device. For example, if user registration is authenticated by the remote server, “the user receives the missing chunk of code [from the server] to proceed with installation of the software.” *Beery, Page 3, Paragraph [0025], Lines 21-23*. As another illustration, at *page 4, paragraph [0039], lines 3-4* in combination with Figure 4, Beery makes clear that authentication and data software delivery occurs “by a server” remote from the computing device that “made the request for data or software.” Figures 5a, 5b and 5c also diagrammatically illustrate this point. Kenton, on the other hand, never mentions a single instance of usage relative to a networked environment during licensing. Thus, neither reference alone or in combination, supplies the necessary teaching to render the claim obvious. For similar reasons, the patentability of **claim 20** is likewise asserted.

In claims 11 and 12, the acts of removing and restoring portions of the license set of executable instructions are now required to occur “exclusively at the computing device.” As before, this is quite unlike Beery which mandates control of data-chunk removal at a server remote from the computing device. Kenton has no instances of usage relating to removal or restoration of portions of executable instructions during license authentication. Rather, Kenton speaks of keys 302 and, optionally, time stamps 314.

In claim 18, it is required to validate files “on a stand alone computing device” wherein the wrapping and validation sets of executable instructions are operable to be executed “on the computing device.” Again, this is quite unlike Beery which requires

processing to occur on the licensing server remote from the computing device. It should be appreciated, however, this claim (and others) still allows for the possibility that the stand alone device is part of a larger network and may, in fact, be connected to the network during authentication. It is just a requirement that the wrapping and validation set of executable instructions operate on the computing device, not elsewhere. Also, the wrapping set of executable instructions are operable to perform the act of “removing a portion of the data file” at the computing device. Again, this is quite unlike Beery which mandates similar acts to occur away from the computing device. Kenton also has no instances of usage of local accounts of removing and restoring portions of data files.

Similar to claim 18, **claim 21** requires wrapping and validating instruction data to be operable on a stand alone computing device, including “removal” and “restoration” of removed portions of electronic data to occur on same. Beery, on the other hand, requires exclusive remote control of licensing. Kenton is completely silent as to any removal or restoration of any portions of electronic data, let alone local removal and restoration.

Consequently, the Appellant submits that (1) all claims are in a condition for allowance; (2) the combination of Beery and Kenton is improper; and (3) even if Beery and Kenton can be combined, they do not individually or in combination meet the limitations of any of the claims. Accordingly, it is respectfully requested that the rejections of the pending claims be reversed and the application be remanded to the Examiner for allowance.

Ser. No. 09/915,030

To the extent any fees are due beyond those authorized in the accompanying fee transmittal for filing a brief in support of an Appeal under 37 C.F.R. §41.20(b)(2), the undersigned authorizes the deduction from Deposit Account No. 11-0978.

Respectfully submitted,

KING & SCHICKLI, PLLC



Michael T. Sanderson

Reg. No. 43,082

247 North Broadway
Lexington, KY 40507
(859) 252-0889

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CLAIMS APPENDIX

The claims on Appeal include 1-21. Claims 1, 3, 8, 11, 12, 16, 18 and 21 appear as previously presented while all others remain as originally presented.

Listing of claims:

1. (Previously Presented) In a computing device, a method of ensuring proper licensing, comprising the steps of:

receiving a data file at the computing device;

removing at least a portion of the data file at the computing device thereby preventing a use associated with the data file;

wrapping a license authentication set of executable instructions around the data file at the computing device;

executing the license authentication set of executable instructions at the computing device to determine whether the data file is associated with a valid license; and

at the computing device, restoring the removed portion of the data file if the valid license exists thereby making the data file available for use.

2. (Original) The method of claim 1, further comprising:
preventing the data file from use if the valid license is not authenticated.

3. (Previously Presented) The method of claim 2, further comprising:
notifying an owner at other than the computing device location if the data file does not have
the valid license.

4. (Original) The method of claim 1, wherein the data file is a set of executable
instructions.

5. (Original) The method of claim 1, wherein the data file is an MP3 music file.

6. (Original) The method of claim 1, further comprising:
customizing the license authentication set of executable instructions based on a user license.

7. (Original) The method of claim 1, further comprising:
providing the license authentication set of executable instructions to one or more
application service providers wherein the license authentication set of executable instructions
is customized based on one or more levels of service of the application service providers.

8. (Previously Presented) A method of authenticating a licensed set of executable
instructions, comprising the executable instructions of:

receiving a license set of executable instructions while a computing device housing the license set of executable instructions is in communication with one or more licensing computing devices;

executing the license set of executable instructions exclusively at the computing device to determine if the license set of executable instructions is associated with a valid license;

permitting the license set of executable instructions to further execute on the computing device if the valid license exists; and

preventing the license set of executable instructions from further executing on computing device if the valid license does not exist.

9. (Original) The method of claim 8, further comprising:
executing the license set of executable instructions while the computing device is not in communication with one or more of the licensing computing devices.

10. (Original) The method of claim 8, wherein the license set of executable instructions is associated with providing a least one of audio, image, and video data.

11. (Previously Presented) The method of claim 8, further comprising:

exclusively at the computing device, removing at least a portion of the license set of executable instructions prior to executing the license set of executable instructions.

12. (Previously Presented) The method of claim 11, further comprising:
exclusively at the computing device, restoring the removed portion of the license set of executable instructions only when the valid license exists.

13. (Original) The method of claim 11, wherein the portion removed is associated with a dynamic linked library necessary for execution of the license set of executable instructions.

14. (Original) The method of claim 11, wherein the removed portion is encrypted using public-private key technology.

15. (Original) The method of claim 14, wherein the private key or public key resides within the license set of executable instructions.

16. (Previously Presented) The method of claim 8, further comprising:

at other than the computing device location, notifying electronically a licensor of the license set of executable instructions if an attempt to execute the license set of executable instructions occurs at the computing device location without the valid license.

17. (Original) The method of claim 16, wherein the notification is made as soon as the computing device is capable of being in communication with the licensing computing devices.

18. (Previously Presented) A system for validating data files on a stand alone computing device, comprising:

a wrapping set of executable instructions operable to be executed on the computing device prior to using a data file on the computing device, the wrapping set of executable instructions operable to remove a portion of the data file thereby preventing a use associated with the data file; and

a validation set of executable instructions on the computing device called by the wrapping set of executable instructions operable to permit the data file to be useable on the computing device if a valid license to use the data file exists on the computing device, usability of the data file including restoration of the removed portion of the data file.

19. (Original) The system of claim 18, wherein the data file is an executable set of instructions.

20. (Original) The system of claim 18, wherein the validation set of executable instructions operates while the computing device is not in communication with any external computing devices.

21. (Previously Presented) Functional data used to ensure proper licensing authority exists to use electronic data, the functional data comprising:

wrapping instruction data exclusively operable at a stand alone computing device to assemble electronic data including removal of a portion of the electronic data; and

validating instruction data operable at the computing device to determine whether a valid license permits use of the electronic data at the computing device and if so providing the assembled electronic data for use including restoration of the removed portion of the electronic data.